(3)

Feb 14, 2008

No. 07-1054

IN THE

Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

v.

HAJI BISMULLAH, et al., and HUZAIFA PARHAT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

John B. Missing
Anupama Connor
DEBEVOISE & PLIMPTON LLP
555 13th Street, N.W.
Ste. 1100E
Washington, D.C. 20004

Jennifer R. Cowan
Philip Rohlik
Keith E. Blackman
Jill van Berg
Andrew Pak
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, N.Y. 10022
(212) 909-6000

Counsel for Bismullah et al.

Sabin Willett
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
Sukti Dhital
Samuel R. Rowley
Laura K. Langley
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Parhat et al.

QUESTIONS PRESENTED

1. Whether the Court should interrupt pending proceedings to review, in advance of its implementation, a preliminary procedural ruling concerning actions brought under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") by detainees incarcerated at the United States Naval Base at Guantánamo Bay.

2. Whether, as the court below held, in an action brought under the DTA, the record on review includes the "Government Information," as defined by the Department of Defense, so as to permit judicial review of whether a detainee's Combatant Status Review Tribunal ("CSRT") was conducted in compliance with applicable regulations, including the regulation requiring that all exculpatory evidence reasonably available to the government regarding the detainee be presented at his CSRT hearing.

PARTIES TO THE PROCEEDING

Respondents here are as follows: (i) Haji Bismullah and his brother Haji Mohammed Wali, acting as next friend, are petitioners below in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. June 9, 2006); and (ii) Huzaifa Parhat, Abdusabour, Abdusemet, Jalal Jalaldin, Khalid Ali, Sabir Osman, and Hammad Mehmet, along with Jamal Kiyemba, acting as next friend of Abdusabour and Khalid Ali, are petitioners below in *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 4, 2006), and in Nos. 07-1508, 07-1509, 07-1510, 07-1511, 07-1512 and 07-1523.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PRELIMINARY STATEMENT 1

STATEMENT 3

A. Background 3

1. Haji Bismullah 3

2. The Uighurs 4

B. The CSRT Procedures And Judicial Review Under The DTA 6

1. The Legal Framework and Actual Practice 6

2. The CSRTs 8

a. The Government Information 9

b. The Government Evidence 10

c. Exculpatory Evidence 11

d. The Hearing 11

e. Witness Testimony 12

f. The Hearing Record 12

C. Procedural History 13

1. The 2006 DTA Filings 13

2. *Bismullah I* 13

3. *Bismullah II* 13

4. *Bismullah III* 14

REASONS FOR DENYING THE PETITION .. 14

A. The Petition Should Not Be Held. 14

B. *Certiorari* Review Is Premature. 15

C. The Petition Should Be Denied Because The Decision Below Is Correct. .. 17

1. The Decision Below Correctly Construed the DTA 17

2. Principles of Administrative and Criminal Law Do Not Require Review of the Decision Below. 20

a. Section 2112 Does Not Define the Record on Review 21

b. If Administrative Law Were Applicable, the Record on Review Would Include the Government Information 22

c. Analogies to Criminal Law and Army Regulation 190-8 Are Unavailing. 24

D. The Government's Claims Of National-Security Risk Provide No Basis For The Court's Intervention In This Case. 25

1. Claims of Undue Burden Provide No Basis to Rewrite a Statutory Obligation. 25

2. The CSRT Procedures and Rulings Below Amply Protect the Government's Interests. 26

3. The Context 28

4. Averments of the Declarations 29

a. The Claimed Burden 29

b. "Reasonably Available" 30

c. Source Compromise 31

d. Disclosure to Counsel 31

e. Concerns Since Resolved 32

f. Irrelevant Argument 32

E. The *Habeas* Appeals Provide No Basis For The Court's Intervention Here 33

CONCLUSION 37

TABLE OF AUTHORITIES

FEDERAL CASES

Bar MK Ranches v. Yuetter, 994 F.2d 735 (10th Cir. 1993) 23

Brady v. Maryland, 373 U.S. 83 (1963) 24

In re Briscoe, 448 F.3d 201 (3d Cir. 2006) 15

Canter v. Am. Ins. Co., 28 U.S. 307 (1830) 16

Cobbledick v. United States, 309 U.S. 323 (1940) 16

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 17

Delta Airlines v. August, 450 U.S. 346 (1981) 20

Dodd v. United States, 545 U.S. 353 (2005) 26

EchoStar Satellite L.L.C. v. FCC, 457 F.3d 31 (D.C. Cir. 2006) 25

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) .. 33

Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989) 23

Flanagan v. United States, 465 U.S. 259 (1984) 16

In re Guantánamo Detainee Cases, Nos. 02-CV-0299 (CKK), 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005) 16

Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979) 33

Hamdi v. Rumsfield, 542 U.S. 507 (2004) 18, 24

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 17

Kent v. United States, 383 U.S. 541 (1966) 20

Kent County v. EPA, 963 F.2d 391 (Fed. Cir. 1992) 23

Kerr v. United States Dist. Court, 426 U.S. 394 (1976) 27

Mathews v. Eldridge, 424 U.S. 319 (1976) 24

Mazurek v. Armstrong, 520 U.S. 968 (1997) 15

Mistretta v. United States, 488 U.S. 361 (1989)..19, 20

Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004).... 33

NLRB v. Fruehauf Corp., 720 F.2d 1398 (5th Cir. 1983) 23

Rasul v. Bush, 542 U.S. 466 (2004) 16

Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522 (1987) 15

South Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882 (D.C. Cir. 2006) 25

United States v. Gonzales, 520 U.S. 1 (1997) 17

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 20

United States v. Nixon, 418 U.S. 683 (1974) 27

United States v. United Foods, Inc., 533 U.S. 405 (2001) 20

Va. Military Inst. v. United States, 508 U.S. 946 (1993) 15

Vance v. Bradley, 440 U.S. 93 (1979). 25

FEDERAL STATUTES & RULES

5 U.S.C. § 551 22

8 U.S.C. § 1189(a)(1) 33

8 U.S.C. § 1189(c) 26

8 U.S.C. § 1535(a) 26

8 U.S.C. § 1535(b) 26

18 U.S.C. § App. 3 26

28 U.S.C. § 451 21

28 U.S.C. § 1291 15

28 U.S.C. § 2112 ..... 20, 22

28 U.S.C. § 2112(a) 21

28 U.S.C. § 2112(b) 14, 17, 21, 23

28 U.S.C.A. § 2112 (Cross References) 22

Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739:

§ 1005(e)(2)(C) 7, 17

§ 1005(e)(2)(C)(i) 23

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635-36 25

D.C. Cir. Rule 47.6(a) 26

D.C. Cir. Rule 47.6(d) 26

MISCELLANOUS

Associated Press, *Life Sentence for Shoe Bomber/"We are not afraid," Judge tells him*, NEWSDAY, Jan. 31, 2003. 31

Mark Denbeaux *et al.*, *No-Hearing Hearings: CSRT, the Modern Habeas Corpus?* (Nov. 17, 2006), *available at* http://law.shu.edu/news/final_ no_hearing_ hearings_report. pdf. 12

Department of State, Country Reports on Human Rights Practices—2006, § 1(c) (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/ 78771.htm. 4

Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced for 22 Years*, N.Y. TIMES, July 28, 2005 31

Eric Lichtblau, *Judge Rules 9/11 Defendant is Competent to Plead Guilty*, N.Y. TIMES, Apr. 21, 2005 31

Joseph Margulies, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 156 (2006) 18

National Public Radio, Morning Edition, "Chinese Detainees at Guantánamo Get Hearing" (Aug. 25, 2005) 6

Petition for Original Writ of Habeas Corpus, *In re Ali*, No. 06-1194 (U.S. Feb. 12, 2007). 5

Sara Wood, Tribunals Held for High-Value Detainees at Guantánamo, March 12, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=3346. 30

PRELIMINARY STATEMENT

The DTA grants every Guantánamo detainee a defined right to judicial review of the CSRT determination that he is an "enemy combatant." This appeal arises from two DTA cases filed in 2006. The interlocutory decision below held that the record on review in such cases includes the "Government Information" ("reasonably available" information in the government's possession, including all exculpatory evidence, concerning the detainee's combatant status). Department of Defense ("DoD") regulations required a tribunal officer to assemble and consider the Government Information, and to cull and present to a hearing panel any selected incriminating information and *all* exculpatory information. The challenged preliminary ruling is necessary to enable, *inter alia*, judicial review of whether the detainee's status determination was consistent with these regulations.

Arguing that the court of appeals need consider only what was *actually* presented to the CSRT hearing panel, the government seeks to delay DTA cases from proceeding, and convert the judicial review mandated by the DTA into a rubber stamp of the panel's determination. Each Respondent believes he can show that compelling exculpatory evidence was in the government's possession but, in violation of DoD regulations, was not provided to his CSRT hearing panel. If the government's view of the record on review were correct, no court would ever see that evidence.

The government's petition ("Petition") should be denied. First, *certiorari* review is premature, as *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bis-*

mullah I"),[1] is an interlocutory decision concerning the contours of the material to be assembled and no actual record exists.

Second, the decision in *Bismullah I* is correct, and was compelled by the plain terms of CSRT regulations and an act of Congress. The government's position is countertextual and would render judicial review meaningless.

Third, the generalized national-security arguments raised belatedly by the government provide no basis for the Court's intervention now. Those concerns were well understood and fully addressed by the court below, which treated them consistently with the clear language of the DTA. Should any actual issues arise, the court will have ample opportunity to address them as necessary in the context of a particular case.

Fourth, the decisions in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196 (collectively, "*Boumediene*"), will not impact the questions presented here. Respondents agree with the *Boumediene* petitioners that the DTA is a manifestly insufficient substitute for *habeas* regardless of the scope of the record on review in a DTA case. The issue in this case, however, is not the constitutionality of the DTA but its interpretation. And since the Court's decision in *Boumediene* will not result in a *contraction* of

---

[1] The government's request for rehearing and suggestion for rehearing *en banc* of *Bismullah I* were denied. Petitioner's Appendix ("PA") 55a-66a, *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) ("*Bismullah II*"); PA 67a-102a, *Bismullah v. Gates*, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) ("*Bismullah III*").

the record on review, the government, which five months ago urged this Court that DTA cases should be "fleshed out," should not now be permitted to delay Respondents' pursuit of the statutory review to which they are entitled.

STATEMENT

A. Background

1. Haji Bismullah

When the Taliban seized power in Afghanistan in 1996, fifteen-year-old Haji Bismullah and his family fled to a refugee camp in Pakistan. Six years later, Bismullah and his brothers answered Hamid Karzai's call for patriots to return to Afghanistan and join with coalition forces. After Karzai became president of Afghanistan, Bismullah's brother became an aide to a provincial governor, and Bismullah was appointed as a district transportation minister. Respondents' Appendix, filed February 20, 2008 ("RA") 221a-223a ¶¶ 6-13; RA 269a-271a ¶¶ 6-13.

In February 2003, Bismullah went to a U.S. military base to vouch for a detained Afghan official who later was released. Apparently persuaded by a false accusation made by members of a rival clan, our military arrested Bismullah during that visit. Immediately after his arrest, Afghan officials notified U.S. military officials that Bismullah had been mistakenly detained, was not associated with the Taliban or al Qaeda, and supported Karzai and the coalition. Nevertheless, Bismullah was transferred to Bagram Air Base and then to Guantánamo. RA 223a-226a, ¶¶ 14-26; RA 271a-276a, ¶¶ 14-31.

Between the time of Bismullah's arrest and his CSRT, numerous Afghan officials, including the Governor of Helmand province (now a member of the Afghan Senate), told U.S. military and diplomatic officials in Afghanistan, orally and in writing, that Bismullah was an ally detained in error. None of that evidence was presented to Bismullah's CSRT panel, and none is in the government's version of the record on review in his DTA case. Bismullah requested that his brother, who could provide compelling evidence that Bismullah's detention was a mistake, be called as a witness at his CSRT hearing. Then a senior spokesman for a provincial governor and routinely quoted in western media, Bismullah's brother was deemed "not reasonably available." RA 226a-228a, ¶¶ 25-32; RA 236a-237a, ¶¶ 1-4; RA 275a-276a, ¶¶ 27-31.

2. The Uighurs

The *Parhat* Respondents are Uighurs, a Muslim minority group from western China long oppressed by the communist regime. Each fled China to escape that oppression,[2] eventually making his way to a Uighur village—termed a "camp" by the government—in Afghanistan. None contemplated or participated in conflict with U.S. or coalition forces, and none supported forces hostile to the United States. None had even the remotest connection with the attacks of September 11, 2001. When the coalition began a bombing campaign

---

[2] The United States has condemned China's human rights abuses of the Uighurs. Department of State, Country Reports on Human Rights Practices—2006, § 1(c) (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm.

in the area, the Uighurs fled to Pakistan, where bounty-hunters sold them to the U.S. military. They were transferred to Guantánamo in approximately May 2002. RA 13a-18a, ¶¶ 35-46, 50-56.

In September, 2002, in a deal with China, the government designated the so-called "Eastern Turkestan Islamic Movement" as a terrorist group. RA 24a.[3] Although Congress never authorized the use of military force against this group, and Respondents' companions at the "camp" were determined to be noncombatants,[4] the *Parhat* Respondents are now held on the theory that they were affiliated with this group.[5] RA 24a, ¶ 77, 42a, ¶ 139.

---

[3] Citing statements by senior U.S. officials, the *Parhat* DTA petition details how this political concession was made to induce Chinese cooperation with Iraq invasion plans. RA 21a-24a, ¶¶ 66-77.

[4] The *Parhat* Respondents were companions of five Uighurs whom CSRT panels determined *not* to be enemy combatants. In all respects the facts were the same. Vigorous efforts by the Pentagon to change the non-combatant findings through second panels ensued. This Court is familiar with one such case, involving a sixth companion initially determined to be a noncombatant. A second CSRT overturned that determination, under intense pressure from the Pentagon. *See* Petition for Original Writ of Habeas Corpus, *In re Ali*, No. 06-1194 (U.S. Feb. 12, 2007). Noting that "[the Uighurs] are all considered the same," a Pentagon official wrote, "[b]y properly classifying them as EC, then there is an opportunity to . . . further exploit them here in GTMO. . . . The consensus is that all Uighurs will be transferred to a third country as soon as the plan is worked out." *Id.* at 8.

[5] A description of ETIM appears in the CSRT record of a Uighur companion of these Respondents, which indicates that the ETIM designation was not based on U.S. intelligence but rather on an article posted on the Internet by a Chinese state news agency.

Yet the military had determined that they were not enemy combatants before CSRTs existed. A colonel wrote of Parhat, "it appears unlikely that Parhat will be determined to be an individual subject to the President's military order of 13 Nov. 2001." RA 128a-129a. Public information indicates the existence of other exculpatory evidence. For example, in August 2005, U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper stated that the government had already attempted to place the Uighurs in "about 25 countries."[6] Exculpatory statements were made by senior officials, including former Secretary of State Colin Powell and Navy Secretary Gordon England. The records underlying these admissions were "reasonably available," but none was presented to any hearing panel, and none would be part of the government's posited record on review. RA 27a-29a, ¶ 89.

B. The CSRT Procedures And Judicial Review Under The DTA

1. The Legal Framework and Actual Practice

In July 2004, Deputy Secretary of Defense Paul Wolfowitz issued an "Order Establishing Combatant

---

The document strongly supports the Uighurs' contention that their enemy-combatant status was the result of a political deal with China. RA 21a-24a, ¶¶ 66-77. Because it is not contained in these Respondents' CSRT Hearing Records, it would be excluded from the record on review advocated by the government.

[6] National Public Radio, Morning Edition, "Chinese Detainees at Guantánamo Get Hearing" (Aug. 25, 2005) (interview with Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues).

Status Review Tribunal" ("CSRT Order"). PA 113a. The Secretary of the Navy followed with an implementation memorandum. PA 120a. Together, these documents comprise the "standards and procedures" that govern the CSRT process (hereinafter, "Procedures"). The CSRTs were held in 2004 and 2005.

The DTA grants the D.C. Circuit jurisdiction "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." It directs the court to decide:

> (i) whether the status determination of the Combatant Status Review Tribunal ... was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

PA 107a-108a, DTA § 1005(e)(2)(C). Thus, at a minimum, the DTA entitles each detainee to challenge whether his status determination was (1) consistent with the Procedures, and (2) based on a preponderance of the evidence.

Below, the government claimed entitlement to the "strongest sort of presumption of regularity" in carrying out the Procedures. Respondent's Motion to Stay,

Parhat v. Gates, No. 06-1397, at 4 (D.C. Cir. Jan. 10, 2007). After oral argument it filed a declaration showing that its practice had in fact been irregular.[7] Additional evidence showed that irregularities were pervasive.[8]

2. The CSRTs

The CSRTs, which the Executive established on its own authority and for its own benefit, *see* PA 118a, § j, involved an expressly nonadversarial process, PA 124a, E-1 § B, including pre-hearing, hearing, and post-hearing steps. The hearing on which the government focuses was only *part* of the CSRT.

---

[7] Declaration of Rear Admiral (ret.) James M. McGarrah, PA 225a-239a. Admiral McGarrah directed the Office for Administrative Review of the Detention of Enemy Combatants ("OARDEC").

[8] RA 283a-297a, Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve, *Al Odah v. United States*, No. 06-1196 (U.S. June 22, 2007); RA 301a-310a, Declaration of William J. Teesdale, Esq., *Hamad v. Bush*, No. 05-1009 (D.D.C. Sept. 4, 2007) (quoting CSRT hearing officer); RA 314a-331a, Declaration of Stephen Abraham, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Nov. 9, 2007). Both below and in the Petition, the government summarized the Procedures' provisions as though they actually were observed. Lt. Col. Abraham and the other knowledgeable declarants contradict these representations. *Compare, e.g.*, RA 183a, Oral Argument Transcript, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397, at 29 (May 15, 2007) (attributing selection of evidence to the Recorder) *with* RA 291a, ¶ 5 ("[T]he Government Evidence was not compiled personally by the CSRT Recorder.").

a. The Government Information

The Procedures required the Recorder—effectively the investigator, prosecutor and clerk of the CSRT—first to "obtain and examine the Government Information," defined as:

> reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.

PA 129a, 141a-145a, E-1 § E(3), E-2 §§ A(2), C(1). Merely reviewing the Government Information was not sufficient; the Recorder was required to collect it so that the Personal Representative (a non-lawyer who was to "assist" the detainee but not act as his advocate) could review it. PA 132a, E-1 § F(8); *see also* PA 133a, E-1 § G(4) (panel hearing to be scheduled only after Personal Representative "has reviewed the Government Information"). Agencies declining to produce information to the Recorder were required either to provide "an acceptable substitute" or certify that exculpatory information was not withheld. PA 129a, E-1 § E(3), E(3)(a).

The Recorder did none of this. The crucial task of finding Government Information was delegated to contractors with limited training or ability to identify reliable intelligence. PA 227a-228a, ¶¶ 4-5; RA 291a, ¶ 5;

RA 322a, ¶ 36. The contractors were given direct access only to portions of two DoD databases that excluded much classified information. PA 230a, ¶¶ 7, 7(a); RA 292a, ¶ 9. In theory, they could request additional information from outside agencies, but in practice, whether an agency responded depended on "whether anyone at the agency was inclined to do so." RA 319a, ¶ 22. OARDEC rarely lodged a request soon enough for a timely response, RA 319a, 320a, ¶¶ 23, 27, and often received no response at all, RA 319a, 320a, ¶¶ 24, 27. Requests for certifications that no exculpatory information was withheld routinely were ignored. RA 293a, ¶¶ 12-14.

b. The Government Evidence

The Recorder was to select from the Government Information incriminating evidence for the hearing panel ("Government Evidence"). PA 138a, E-1 § H(4). "Evidence" is a euphemism. The Government Evidence consisted primarily of "intelligence products of a generalized nature—often outdated, often 'generic,' [and] rarely specifically relating to the individual subjects of the CSRTs or to the circumstances of those individuals' status." RA 291a-292a, ¶ 8; *see also* RA 324a-325a, ¶ 43. While the Procedures established a presumption that this material was genuine and accurate, PA 136a, E-1 § G11, "[i]nformation relating to the credibility of a source was omitted, making sources appear authoritative even when they were suspect," RA 326a, ¶ 50.[9]

---

[9] Accusations against groups appeared in "Government Evidence" without disclosing that the source was a group's political opponent

c. Exculpatory Evidence

With a presumption in favor of incriminating "evidence," the necessity of compliance with regulations regarding *exculpatory* evidence was manifest. The Procedures were clear. If the Government Information included *any* exculpatory evidence, "the Recorder *shall* also separately provide such evidence to the Tribunal." PA 138a, E-1 § H(4) (emphasis supplied). Because detainees had no counsel, no right to know the incriminating "evidence," nor any practical means to gather evidence from overseas, PA 131a, E-1 § F(3)-(5), PA 133a, § G(2); RA 327a, ¶ 55, the Recorder's diligent performance of this duty was crucial. "[T]he Recorder's failure to adhere to the DoD Regulations can influence the outcome of the proceeding to a degree that a prosecutor or an agency staff member cannot; as a practical matter, the Recorder may control the outcome." PA 79a (*Bismullah III*). Yet Admiral McGarrah admitted that OARDEC sometimes withheld exculpatory information. PA 236a, ¶¶ 13a-b. Although compliance with the Procedures is an issue that the court below was expressly tasked to review under the DTA, this violation of the Procedures could never be established under the government's version of the record on review.

d. The Hearing

After the information was collected and reviewed, a hearing was convened before a panel of three military

---

or an openly hostile government, points significant to Bismullah and the *Parhat* Respondents. RA 326a, ¶ 50.

officers. The panel was to "determine whether the preponderance of the evidence supports the conclusion that [the] detainee meets the criteria to be designated as an enemy combatant." PA 136a, § G(11). Its determination was subject to approval of the CSRT Director. PA 142a, E-1 § I(8). Uncongenial results were often ordered to be revisited. RA 296a, ¶ 23; RA 308a, ¶ 7(v).

e. Witness Testimony

Although the Procedures expressly allowed witnesses from outside Guantánamo to testify remotely, PA 136a, E-1 § G(9)(c), not a single outside witness was ever permitted to testify. RA 328a, ¶ 58; RA 305a, ¶ 7(i); Mark Denbeaux *et al.*, *No-Hearing Hearings: CSRT, the Modern Habeas Corpus?* at 1 (Nov. 17, 2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report. pdf.

f. The Hearing Record

The Recorder was tasked with compiling the record of the *panel* proceedings ("Hearing Record"). This record did *not* include relevant information in the government's possession, or even the Recorder's possession, unless actually presented to the hearing panel. PA 146a, E-2 § C(8). Confining the record on review to the Hearing Record thus would obscure from judicial review any exculpatory material the Recorder failed to assemble, cull, or present.

C. Procedural History

1. The 2006 DTA Filings

Respondents filed their DTA petitions in 2006, and separately moved to compel production of information necessary for the record. In 2007, the court ordered joint briefing on the record on review and a protective order. It held oral argument on May 15, 2007. The government submitted Admiral McGarrah's declaration over two weeks later. PA 225a-239a.

2. *Bismullah I*

On July 20, 2007, the panel unanimously held that the record on review includes the Government Information as defined by the Procedures. PA 2a.

The court also proposed a protective order that included, essentially verbatim, the government's request to submit for *in camera* review material it contends is too sensitive for counsel's review and provides sanctions for violations of the order generally. PA 81a-82a (*Bismullah III*). The protective order was subsequently entered and amended but this provision remained unchanged.

3. *Bismullah II*

In September 2007, the government moved for rehearing and rehearing *en banc*, for the first time making a factual proffer concerning burden and national security through the declarations assembled at PA 182a-224a. The government now asserted that compiling the Government Information would "impose[] an enormous burden" (a change of position, *see* PA 64a; previously the government said its review of Government Information was so routine as to merit a pre-

sumption of regularity), and would cause "exceptionally grave damage to national security." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 7, *Bismullah v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Sept. 7, 2007) (quotation omitted). The panel reviewed the declarations and denied reconsideration, noting that *Bismullah I* had simply "adopt[ed] the definition of Government Information exactly as it appears in the DoD Regulations themselves." PA 59a. The security concerns had also been addressed: "[we] provid[ed], just as the Government urged, that it may withhold from the [Respondents'] counsel any Government Information that is either 'highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee.'" PA 64a.

4. *Bismullah III*

On February 1, 2008, the full court of appeals denied the government's request for rehearing *en banc*. Chief Judge Ginsburg responded to a new contention, appearing for the first time in Judge Randolph's dissent, that 28 U.S.C. § 2112(b) defines the record on review. PA 71a-72a.

REASONS FOR DENYING THE PETITION

A. The Petition Should Not Be Held.

Respondents urge the Court to consider and deny the Petition, and *not* to hold it. The Petition is both premature and meritless and should be denied now so that Respondents may proceed with their DTA cases.

B. *Certiorari* Review Is Premature.

Bismullah I is an interlocutory order regarding information to be included in the record on review. It falls well outside the normal scope of orders for which *certiorari* review is granted. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (*per curiam*); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of *certiorari*); *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 527 (1987). Because there is no actual record in any case, as Judges Rogers and Brown agreed, the question of what actually would go into a specific record on review remains open. PA 30a, 99a.

Every interlocutory appellant argues that its concerns must be reviewed immediately, lest inconvenience or injustice ensue. The principle of the final judgment rule recognizes that the greater harm lies in systemic delay, *In re Briscoe*, 448 F.3d 201, 214-15 (3d Cir. 2006), a harm that is compounded when this Court is asked to spend its scarce adjudicatory resources reviewing preliminary procedural orders. The government's claim for an exception boils down to the assertion that it would be required to undertake a larger search and place into a secure facility a larger record than would be the case if the decision is reversed. Not only is its claim of interlocutory harm unpersuasive, as further discussed below, but the burden it asserts is minimal compared to the burden that delay imposes on Respondents who remain imprisoned.

While this Court is not subject to the final judgment rule, 28 U.S.C. § 1291, the strong policy of the rule militates against a grant of *certiorari* review here.

Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must not be leaden-footed."); *Flanagan v. United States*, 465 U.S. 259, 264 (1984). *See also Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830).

In 2004, this Court directed the district courts to "consider in the first instance the merits" of the *habeas* cases. *Rasul v. Bush*, 542 U.S. 466, 485 (2004). District judges declined to do so (in the leading case, a stay entered even after the court found that good claims had been stated).[10] Cases did not proceed through the system, noncombatant detainees suffered, the Executive never obtained the benefit of favorable adjudications, facts were not established, and Congress enacted legislation premised on the CSRT process without knowing what actually happened in it. Years later, the judicial branch finds itself without a single case even briefed. A grant of the Petition would simply prolong this unfortunate history.

---

[10] *See In re Guantánamo Detainee Cases*, Nos. 02-CV-0299 (CKK) *et al.*, 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005), an approach followed by all district judges.

C. The Petition Should Be Denied Because The Decision Below Is Correct.

1. The Decision Below Correctly Construed the DTA.

The government cannot apply the administrative-law definition of the record without also importing the protections provided to individuals subject to agency action. Since none of those protections was granted to detainees in the CSRT process, the record on review is not defined by 28 U.S.C. § 2112(b) or analogies to administrative law, but by the DTA and its internal reference to the Procedures. Even if section 2112(b) were relevant, its terms, and general administrative-law principles dictate that the record on review should include the Government Information.

When statutory terms are plain and not absurd, courts are bound to enforce them. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The terms are plain here.[11] The statute requires review of whether the status determination was "consistent with the standards and procedures specified by the Secretary of Defense." PA 107a-108a, DTA § 1005(e)(2)(C). Among those Procedures is the requirement that the "reasonably available" information in the government's possession be reviewed, and that all exculpatory evidence be presented to the hearing

---

[11] For this reason, the government's reliance on legislative history is misplaced. *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

panel. Without access to the Government Information, the court cannot determine whether that occurred. PA 58a-59a (*Bismullah II*).[12] As Chief Judge Ginsburg noted in *Bismullah III*, to rely on a more narrow record "would render utterly meaningless judicial review intended to ensure that status determinations are made 'consistent with' the DoD Regulations." PA 78a.

The government never explained how the court was to carry out this review function, except by indulging a presumption of regularity. Its proposed record would make that presumption irrebuttable, for without the Government Information, the Recorder's actions would forever remain secret. PA 14a-15a (*Bismullah I*). Moreover, whatever notion of regularity survived the "unsettling" factual record below, PA 30a-31a, was abandoned in the Petition. The government asserts that it "likely" cannot comply with the court's order and collect the Government Information as defined in the DTA, which is effectively an admission that it did not comply with the Procedures in 2004. Pet. 19.[13]

---

[12] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), involved the kind of controlled record the government again urges for DTA review. *Id.* at 512-14 (describing Mobbs Declaration). After remand from this Court, when preliminary rulings in the district court threatened to expand that record, the government quickly released Hamdi to the Kingdom of Saudi Arabia. *See* Joseph Margulies, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 156 (2006). Yaser Hamdi is a free man today.

[13] *See* PA 76a n.5 ("The record before the court suggests the Recorder has not always fulfilled his obligations under the DoD Regulations.").

The government's contention here is also inconsistent with its admission below that the Hearing Record is an inadequate basis for DTA review of whether the CSRT's determination was based on a preponderance of the evidence. In late October 2007, the government finally disclosed the Hearing Record in Huzaifa Parhat's case. On receipt, counsel sought summary disposition, arguing that the Hearing Record demonstrates as a matter of law that none of the allegations against Parhat would make him an "enemy combatant."

In opposing, the government argued that if the lower court determined that the Hearing Record was insufficient, the government should be permitted to conduct another CSRT because "in any given case there may be additional evidence against a petitioner that supports an enemy combatant determination, but which was never presented to the Tribunal" and thus was not part of the Hearing Record. Corrected Brief for Respondent at 56-57, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Feb. 8, 2008). This argument admits the correctness of Chief Judge Ginsburg's conclusion that the court cannot make the preponderance determination based on the Hearing Record: even the government says there "may be additional evidence" relevant to the preponderance issue.[14]

---

[14] The government's view of the record is so restrictive as to raise inter-branch issues that should not be addressed without a more complete record. "[T]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial ac-

2. Principles of Administrative and Criminal Law Do Not Require Review of the Decision Below.

The government never claimed below that the CSRT was an "administrative agency"; it argued only that the Administrative Procedure Act ("APA") and administrative law applied by "analogy." RA 180a; Pet. 20-21. Seizing on a theory first posited by Judge Randolph in his dissent to *Bismullah III*, the government now claims that 28 U.S.C. § 2112 "applies by its plain terms" to limit the record on review to the Hearing Record. Pet. 20-21.[15] But none of the safeguards that assure the reliability of agency hearing records was present during the CSRT process, which was indeed *sui generis*. PA 74a. Detainees were forbidden from seeing the evidence against them and hence unable to lodge responses in the record. PA 78a. Exculpatory information might reach the CSRT panel only through the fortuity of its presence in government

---

tion." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (dictum); *see Kent v. United States*, 383 U.S. 541, 560 (1966) (meaningful review "should not be remitted to assumptions"); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). To base a judicial ruling on a matter as grave as indefinite imprisonment on a presumption of regularity—particularly given the evidence of pervasive irregularity here—would indeed be to cloak the Executive's work in "the neutral colors of judicial action." *Mistretta*, 488 U.S. at 407.

[15] Absent from oral argument, and never mentioned in *three rounds* of briefing below, the argument was waived. *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Sound exercise of discretion militates against granting interlocutory *certiorari* review on the basis of an argument that was not previously raised by the petitioner.

hands and the faithful conduct of the Recorder. PA 75a-76a.

Since "a CSRT's status determination is the product of a necessarily closed and accusatorial process in which the detainee seeking review will have had little or no access to the evidence the Recorder presented to the Tribunal, little ability to gather his own evidence, no right to confront the witnesses against him, and no lawyer to help him prepare his case, and in which the decisionmaker is employed and chosen by the detainee's accuser," to allow the government to withhold the Government Information from the court would mean proceeding "as though the Congress envisioned judicial review as a mere charade when it enacted the DTA." PA 78a-79a.

a. Section 2112 Does Not Define the Record on Review.

Section 2112 discusses appellate review of orders of "*administrative* agencies, boards, commissions, and officers." 28 U.S.C. § 2112(a) (emphasis supplied). Section 2112(b), which defines the "record on review" to be filed in an appeal of "such a proceeding" (*i.e.*, one described in subsection (a)), uses the word, "agency" as shorthand for "administrative agency," as used in subsection (a). This reading finds support not only in the plain text, but in the definition of "agency" in 28 U.S.C. § 451, which includes both "commissions" and "boards." Thus, when section 2112(b) includes "agency, commission and board" in its list, "agency" must mean "administrative agency."

Unwilling to provide detainees with the procedural protections guaranteed under the APA, *see* PA 74a, the

government cannot now rest on administrative law to limit the record on review. If its new argument is correct, and the record limitations of section 2112(b) apply to the DTA, then the CSRT *is* an agency subject to the APA, because, as Judge Ginsburg explained, none of the exclusions to the definition of "agency" in 5 U.S.C. § 551 applies. PA 74a. If that were so, then Respondents were entitled to the full suite of procedural protections enjoyed by litigants before administrative agencies, including the parties in the government's cases discussing the record on review. *See* Pet. 20.

Had Congress intended section 2112 to define the DTA record on review, it could have referenced section 2112 expressly, as statutes often do. *See* 28 U.S.C.A. § 2112 Cross References (citing numerous statutes invoking section 2112). Regardless, a general right-of-review provision not cited in the DTA does not supersede the specific scope of judicial review mandated by the DTA. *See* PA 76a.

b. If Administrative Law Were Applicable, the Record on Review Would Include the Government Information.

Even if administrative-law principles applied by implication, or section 2112 applied expressly, the record on review would include the Government Information. The Recorder, who was an integral part—indeed, the cornerstone—of the CSRT, was *required* by the Procedures to collect and review *all* Government Information. PA 145a, E-2 §C(1). The CSRT was deemed to have access to and to have reviewed all Government Information through the Recorder. PA 116a, § g(7); PA 129a, § E(3). Thus, material the Re-

corder saw or should have seen constitutes material "directly or indirectly considered" by the "agency," *i.e.*, the CSRT. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

Section 2112(b) itself requires that when a question of fact is being reviewed, the record include "all of the evidence before the agency." The DTA expressly authorized the court below to question the CSRT's factual findings. PA 107a, DTA § 1005(e)(2)(C)(i); *see also NLRB v. Fruehauf Corp.*, 720 F.2d 1398, 1401 (5th Cir. 1983) ("regardless of the Board's procedures," section 2112(b) requires material considered by the investigator but not by the decision-making Board to "be part of the record before this court when it considers petitions for enforcement or review").

Furthermore, courts have not hesitated to consider a record broader than the one defined by the agency where there is evidence that the agency failed to create a complete record. *See, e.g., Kent County v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) (administrative record included documents "not before the agency when it made the decision" where agency was "at least negligent in failing to discover" documents). The CSRTs were non-adversarial proceedings in which the Recorder had exclusive power over the record, and there is strong evidence that the Recorder failed to create a complete record.

Courts also review all the material before the agency where serious questions arise whether the agency followed its own procedures. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). The evidence more than establishes such questions here. If applicable, core administrative-law principles would require pro-

duction of the Government Information as necessary for performance of the judicial review mandated by Congress in the DTA.

c. Analogies to Criminal Law and Army Regulation 190-8 Are Unavailing.

As explained in *Bismullah II*, attempts to analogize the CSRT process to criminal proceedings and Army Regulation 190-8 must fail. PA 59a-60a. The court must look to the language of the DTA for the record on review. The proposed analogies involve different regulations or statutes and a different balance of due process and inherent protections in the initial determination.

Brady v. Maryland, 373 U.S. 83 (1963), is unavailing for exactly that reason. The constitutional obligation to produce a more limited universe of exculpatory material in a criminal proceeding arises in a context in which the defendant has a full panoply of procedural protections—among them, the right to counsel, pretrial discovery procedures, and every opportunity to confront incriminatory evidence and respond to it by adding to the record. A detainee has none of that; the government controls the entire CSRT process. To invoke *Brady* in a Respondent's seventh year of uncharged indefinite imprisonment is remarkable.

Similarly, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-33 (2004), the plurality interpreted the Constitution, not a statute, and constructed a procedural framework by applying *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court's path here is dictated by the DTA's terms, and particularly its mandate that the court of appeals exercise meaningful oversight of the government's

compliance with the Procedures. The Government Information is plainly required for the court to fulfill that role.

Hearings under Army Regulation 190-8 are held in the field soon after capture, when percipient witnesses are available. The CSRTs operated on the basis of unsourced hearsay, years after the fact, and while under extreme command pressure.

D. The Government's Claims Of National-Security Risk Provide No Basis For The Court's Intervention In This Case.

The government expresses two concerns about national security: (i) concerns about *burden*—namely, time and effort needed for compliance, and (ii) concerns about *secrecy*—to wit, the consequences of disclosure to counsel. Each concern was fully and fairly addressed below, by a court to whose institutional competence such questions are regularly entrusted.

1. Claims of Undue Burden Provide No Basis To Rewrite a Statutory Obligation.

The Court cannot relieve a party from requirements imposed by Congress even if it believes them to be unduly burdensome. *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006). Grounded in the separation of powers doctrine, this principle applies equally in this Court. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The government asks this Court to rewrite the DTA, although Congress declined to do so when it amended other portions of the statute. *See* Military

Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635-36 (amending portions of the DTA after Bismullah first made record requests). The government improperly seeks to have this Court legislate what Congress did not. *Dodd v. United States*, 545 U.S. 353, 359 (2005).[16]

2. The CSRT Procedures and Rulings Below Amply Protect the Government's Interests.

Whether the subject is a terrorist trial, a government contract with a manufacturer of Uranium-238, or the detention of a civilian in Guantánamo, no court more regularly addresses national-security concerns than the D.C. Circuit.[17]

The government's concerns were carefully addressed by that court. First, under the Procedures, an agency *already* can decline to produce material (thus rendering it not "reasonably available") if it provides an adequate substitute or certifies that the information is not exculpatory. PA 129a, E-1, § E(3)(A). This eliminates the need for the time-consuming pre-

---

[16] These cases do not warrant *certiorari* review, as no burden was shown as to these Respondents. The government advised in August that it was "expending significant resources actively gathering and reviewing material that might be treated as part of the record in this case and other cases filed under the DTA," Resp't Opp. to Dates Proposed in Mot. for Entry of Scheduling Order at 7-8 (filed Aug. 22, 2007), but the government's submissions identify no specific burden associated with these Respondents.

[17] Congress regularly reposes authority and discretion in this area on that court. *See* 8 U.S.C. §§ 1535(a), (b); 8 U.S.C. § 1189(c); D.C. Cir. Rules 47.6(a), (d). *See also* Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16.

disclosure review of which the government complains.[18] Second, the protective order permits submission for *in camera* review of any material the government contends is too sensitive for counsel's review. PA 81a.[19] Third, it imposes sanctions for any violations of confidentiality. PA 51a. Where those tools are inadequate, case-by-case amendments of the protective order or other prehearing procedures may be considered in a specific DTA case.

The government never explains why these tools are inadequate. The Hearing Records contain Government Information—just not all of it—and therefore should already contain information quite as sensitive as the omitted material.[20] Since 2004, Hearing Records, in the form of *habeas* returns, have been shared with scores, perhaps hundreds of *habeas* counsel. The government never sought to make a record below explaining why this system, which has worked since 2004, would not continue to work.

---

[18] The government claims that it has "always sought in good faith to provide Tribunals with any pertinent . . . exculpatory information." Pet. 25. As it is now clear that all exculpatory information was not provided during the 2004 CSRTs, the government should have no objection to conducting the relevant searches now.

[19] In the context of claims of governmental privilege, the Court has held that *in camera* review "is a highly appropriate and useful means of dealing with [such] claims." *Kerr v. United States Dist. Court*, 426 U.S. 394, 405-06 (1976); *United States v. Nixon*, 418 U.S. 683, 706 (1974).

[20] If the Hearing Records contain *less* sensitive information than the Government Information, that suggests that the 2004 searches were not properly conducted and highlights the need for swift adjudication of DTA cases with full records on review.

Any burden is due to the government's failure to comply with its own Procedures. The government knew in 2004 that the CSRTs would be subject to litigation. Although the DTA had not yet been enacted, the CSRTs were implemented immediately after *Rasul*. Had the government collected the Government Information, as the Procedures required, and retained it, production of the required records now would entail minimal effort. The government's failure to comply with the Procedures in 2004 should not relieve it of its statutory obligations today.

3. The Context

The government's national-security alarums arose only after adverse judicial rulings.

When it filed its opening brief below, the government did not describe any threat to national security. Indeed, at oral argument it suggested that national-security concerns were manageable, assuring the court that *ex parte* submissions required to protect that interest would be minimal. RA 204a.

The first declaration was filed only *after* oral argument. PA 225a. It disclosed no national-security risk except at paragraph 12a (averring that government information was sometimes withheld because it "could reasonably be expected to cause harm to national security by revealing sensitive information such as sources and methods"). PA 235a. There the matter stood through June and most of July. The government filed no other declarations.

Bismullah I issued on July 20. The court invited, and the parties provided, comment on the proposed protective order, with no changes to its *ex parte* provi-

sions. In October, the court further amended the order following its review of the public versions of the security declarations.

Only after briefs, an oral argument, a post-argument declaration, and an adverse decision did the government file the suite of new declarations in September. PA 182a-224a.

4. Averments of the Declarations

The panel closely reviewed the averments in the publicly filed declarations. On October 3, 2007, it found that they did not counsel a different result on the record on review. PA 55a-66a.

a. The Claimed Burden

As Chief Judge Ginsburg noted, the practical issue was the burden of compliance, not any real risk to security, PA 60a, and burden is not sufficient, PA 60a-63a.

But claims of burden were overstated. For example, CIA Director Hayden says that the CIA may have to produce "tens of thousands" of "highly classified documents." PA 184a. There are approximately 180 DTA petitioners. If "tens of thousands" means (hypothetically) 50,000, there may be fewer than 300 documents per detainee. For all we can tell, as to many detainees, there may be no "highly classified" documents at all.

Most of the Government Information is readily available, including apprehension reports, interrogations logs and the interrogators' "knowledgeability

briefs."[21] The government was able to hold 558 CSRTs within just a few months, beginning in August 2004, when national-security concerns were certainly no less severe.[22] Its ability to act quickly then suggests either that its claims are rhetorical now, or that in 2004 its irregularities were massive. If the latter, it is all the more urgent that the situation be remedied and that the cases proceed on a full record.

Director Hayden says that many CIA documents reveal clandestine and covert intelligence activities. PA 185a-186a. Yet since 2004 such materials have been disclosed to security-cleared *habeas* counsel in a secure facility. Nothing should be different about the sensitivity of the current material. There simply would be more of it.

b. "Reasonably Available"

Bismullah I ordered only the production of what is reasonably available. PA 2a. FBI Director Mueller's description of burdens attending FBI computer searches, PA 192a-193a, is a contention as to what is "reasonably available," as is NSA Director Alexander's discussion of signal intelligence, PA 204a-205a. The thousands of hours of research Secretary England identifies, PA 218a-222a, may be a similar contention, or

---

[21] *See, e.g.*, Memo. in Supp. Pet. Mot. for Preservation Order, *El Banna v. Bush*, No. 04-CV-1144 (D.D.C. Dec. 5, 2005) (RWR) (detailing types of documents believed to be in the government's possession).

[22] *See, e.g.*, Sara Wood, Tribunals Held for High-Value Detainees at Guantánamo, Mar. 12, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=3346.

may evidence a fruitless effort to find some basis for detention in a specific case. The government is certainly free to assert its claims in individual litigations. If so, the court will adjudicate them. But in the absence of concrete claims anchored to a specific record, the generic affidavits proffered by the government provide no basis for sound judicial decisionmaking.

c. Source Compromise

Director Hayden avers that disclosure of some CIA information might compromise foreign intelligence services and confidential sources, or dissuade them from future cooperation. PA 186a. Director Mueller makes a similar point. PA 196a. The thesis ignores the option, in an appropriate case under the Procedures, to produce a certificate or suitable replacement. Again, arguments like this can only be addressed in the context of specific cases.

d. Disclosure to Counsel

Director Hayden sees danger in disclosure of information to security-cleared counsel. PA 187a-188a. Yet lawyers practicing in the federal courts often receive highly classified information. The trials of the shoe bomber in Boston, the millennium bomber in Seattle, and Zacharias Moussaoui in Northern Virginia are recent cases in which classified information was disclosed to defense counsel, without compromising national security. *See* Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced for 22 Years*, N.Y. TIMES, July 28, 2005, at A20; Eric Lichtblau, *Judge Rules 9/11 Defendant is Competent to Plead Guilty*, N.Y. TIMES, Apr. 21, 2005, at A14; Associated Press, *Life Sentence for Shoe Bomber/"We are not afraid," Judge tells him*, NEWSDAY,

Jan. 31, 2003, at A06. Congress knew, when it enacted the DTA, that it was creating judicial review. That meant that lawyers would have access to classified information.[23]

e. Concerns Since Resolved

Director Mueller raised certain logistical concerns regarding classified information, PA 197a, that were thereafter addressed by the court below in revisions to its protective order dated October 23, 2007, PA 45a-49a, a measure that, as Director Mueller concedes, "would alleviate some of the FBI's concerns," PA 198a.

f. Irrelevant Argument

Director of National Intelligence McConnell and General Alexander describe the appalling crimes of 9/11, and the latter adds a section about a "global war on terror." PA 201a. But these declarants add nothing specific about national security other than the point about signal intelligence.

* * * *

In sum, the declarations do not justify this Court's intervention. *Of course* national security is involved, as Congress well knew when it enacted the DTA. And there may be issues left to litigate in other DTA cases about specific records. But none of this justifies this Court's intervention in the careful work performed by

---

[23] Admiral McGarrah's declaration disclosed that Government Information was reviewed in the first instance not by skilled intelligence officers, but by newly hired contractors with two weeks' training. PA 227a-230a. Subcontracting this work hardly suggests alarm about security matters.

the institutionally proper court to impose safeguards necessary to protect national security. *See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 154 (D.C. Cir. 2004) (exercising its exclusive jurisdiction to review appeals of designated "foreign terrorist organizations" under 8 U.S.C. § 1189(a)(1)); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (recognizing executive competency in national security, but holding that "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue to critically examine instances of its invocation"); *Halperin v. Kissinger*, 606 F.2d 1192, 1199 (D.C. Cir. 1979) ([W]hen presented with a "conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated . . . . We must carefully consider any impact that its decision might have on the nation's ability to defend itself."), *aff'd per curiam*, 452 U.S. 713 (1981).

E. The *Habeas* Appeals Provide No Basis For The Court's Intervention Here.

The government argues that these cases are "in significant respects intertwined with the threshold issues pending before the Court in *Boumediene*," Pet. 13; that "[t]he outcome in this case may be directly affected" by this Court's disposition of the *habeas* appeals, *id.* at 17; and, therefore, that "the Court should hold this petition pending *Boumediene*," *id.* at 19.

The government first raised the purported linkage between these cases and the *habeas* appeals five months ago, but in a very different way. At that time, the statute and the regulations were what they are today. The *habeas* appeals were pending, just as they are to-

day. *Bismullah I* defined the "record on review" just as it does today, to include the entirety of the Government Information.[24]

Yet what the government told this Court it should do about purported "intertwining" then was *the precise opposite* of what it says today. "If this Court determines that [the *habeas*] petitioners have Suspension Clause rights and that *habeas* would have been available to them at common law," the government wrote, "it should decline to rule on the adequacy of the DTA at this time, *but instead require them to exhaust their available DTA remedies.*" Brief for Respondents at 41, *Boumediene v. Bush, Al Odah v. Bush*, nos. 06-1195, 06-1196 (U.S. Oct. 9, 2007) (emphasis supplied). It was full speed ahead in the DTA proceedings: "This Court should not attempt to evaluate the adequacy of the DTA until the District of Columbia Circuit has had an opportunity to construe the statute *and this Court can examine its operation in a concrete setting.*" *Id.* (emphasis supplied). *Habeas* should be stalled, the government argued, while "important questions . . . as to the scope of review" in a DTA case were "fleshed out on a case by case basis." *Id.* "Case by case," "concrete setting," "exhaustion": the drumbeat was unmistakable. *Habeas* appeals must stand aside while cases moved to decision under the DTA.

That was then. In the *habeas* appeals, the government urged this Court to defer to the DTA; now it urges the same Court—by seeking *certiorari* review of an interlocutory ruling, no less—to defer the DTA to

---

[24] *Bismullah II* was decided six days earlier. PA 55a.

habeas. There is a consistency here, and has been since 2004: all progress, in all cases, should simply be frozen. But neither argument is sound, because the cases present different issues. There is no reason that any *habeas* petitioner should have to exhaust DTA remedies, and the DTA cannot be converted into *habeas* through exhaustion. Conversely, there is no reason for this Court to delay Respondents' pursuit of the review that the DTA provides. DTA cases like this one turn on questions of statutory, not constitutional, construction, a determination made based on the statute's text and function.

The government suggests that the Court might construe the DTA in *Boumediene* to "avoid" any constitutional difficulty. Pet. 13. How such a construction could *contract* the record is a mystery. If the *Boumediene* petitioners prevail, there is a constitutional right to *habeas*, and contracting the record will hardly create an adequate substitute. If the government prevails, no question of constitutional avoidance arises. The government's position in *Boumediene* underscores the urgency of progressing cases under the DTA, which it says is the only judicial review available. Further delaying access to that review is unconscionable.

Nor is the question whether the government might hold new CSRTs rather than produce records on review in DTA cases a link between this case and *Boumediene*. No aspect of *Boumediene* would require the government to institute new CSRTs, and no party to *Boumediene* asked for them. The only decision that contemplates new CSRTs is *Bismullah II*, which mentions the possibility only as an alternative to producing

the Government Information.[25] Thus, the possibility of further CSRTs under the DTA regime does not justify linking these cases with the *habeas* appeals.

Respondents agree with the *Boumediene* petitioners that the DTA is unconstitutional because it does not provide a remedy remotely equivalent to the *habeas* review to which they are entitled. Respondents, however, are entitled to their statutory review, and there is no scenario in which this Court's ruling in *Boumediene* will constrict the contours of that review. Allowing the government to tie its Petition seeking to narrow the statute to the disposition of cases not presenting that issue simply interposes yet more months of delay before Respondents can obtain any review of their imprisonments.

The government suggests that a ruling in *Boumediene* would "highlight the importance of the procedures for DTA review." Pet. 13. Huzaifa Parhat is in Camp 6—the issue needs no highlighting for him. One suspects that, with 180 cases now stalled, the court below needs no highlighting either.

---

[25] The concept of new CSRTs has never made sense. If a new CSRT is convened, the government will have the same obligation to assemble the Government Information, and the same obligation to place all exculpatory evidence before the panel. The posited burdens in assembling this material would be unchanged. The "risks" to national security through counsel access in subsequent DTA review would be the same. It would be no easier to assemble the material for a CSRT than it would be to assemble it for the record on review in a DTA case.

CONCLUSION

For the foregoing reasons, the Court should not hold the Petition and should deny it.

Respectfully submitted,

John B. Missing
Anupama Connor
DEBEVOISE & PLIMPTON LLP
555 13th Street, N.W.
Ste. 1100E
Washington, D.C. 20004

Jennifer R. Cowan
Philip Rohlik
Keith E. Blackman
Jill van Berg
Andrew Pak
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, N.Y. 10022
(212) 909-6000

Counsel for Bismullah et al.

Sabin Willett
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
Sukti Dhital
Samuel R. Rowley
Laura K. Langley
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Parhat et al.

Dated: March 3, 2008